The State Government of Sarawak & Ors v Teo Soo Chuan

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–676–11 OF 2011
ABDUL WAHAB PATAIL, HAMID SULTAN AND VARGHESE GEORGE JJCA
5 DECEMBER 2013

Land Law — Easements — Extinguishment of — Whether extinguished by effluxion of time — Whether deeds contained provision limiting right of way to any length of time — Whether there was alternative access — Whether respondent adversely affected by improvements to land granting easements — Whether respondent entitled to extinguish registered easement

The respondent was at all material times the registered proprietor of a piece of land, described as Lot 27 in the Kuching Town Land District (Lot 27), which he inherited from his late father. In the mid-1950's the respondent's late father (the grantor) had created two easements over Lot 27. The easements were originally granted as a right of way over Lot 27 (the servient tenement) to the owners of four pieces of lands (the dominant tenement) 'their tenants, agents, servants, workmen, licensees and invitees'. However, in the course of time the four pieces of land were sub-divided and the usage of the right of way had been increased and resulted in the private right of way becoming a public right of way. This increase was acknowledged by the Municipal Council (the third appellant), by its act in tar sealing the right of way and putting up street lightings and drains along the way. The respondent took objection to the present use of Lot 27 as a public right of way. The respondent thus filed an action against the appellants for, inter alia, declarations that the easements had been breached and had been determined or extinguished by the effluxion of time. It was the respondent's case that the excessive use of the right of way granted had caused him grave injustice and that the appellants were liable jointly or severally to compensate him for the loss of the use and enjoyment of Lot 27. The respondent submitted that with the sub-division of the dominant tenement the easements created for the benefit of the original tenements had been extinguished. The respondent further submitted that it was the responsibility of the appellants to provide road access before approving the sub-division of the dominant tenement and that their failure or negligence to do so had resulted in the loss of use of land suffered by the respondent. The appellants claimed that the terms of the instruments creating the easements (the deeds) were clear and unambiguous that what was intended to be created was a public right of way or easement. The respondent argued that the easement created was a private right of way. The trial judge found that the change in the characteristic of the usage of the right of way from private right

of way to public right of way had caused the easements to be determined. In the circumstances of the present case it was held that the fairest position would be to declare that the easements had been extinguished and for the appellants to acquire from the respondent the land over which the easements had been granted and to pay compensation to the respondent in accordance with the provisions of the Sarawak Land Code. This was an appeal by the appellants against that decision on the grounds that the trial judge had misconstrued the terms of the easement instruments and other relevant facts.

Held, allowing the appeal with costs fixed at RM20,000:

(1) The deeds in the present case signified that the grantor had granted a right of way in the nature of an easement to the grantees and their successors in title. A proper appreciation of the words in the deeds required not only an examination of the words used but also to bear in mind that the law of easements was about rights granted by the proprietor of a servient tenement to the proprietor of a dominant tenement. An examination of the deeds in the present case showed no provision limiting the right of way to any part of Lot 27 or to any length of time. As such, the easement was granted over all of Lot 27 without limitation of time (see paras 32–35, 42 & 46).

(2) Termination of the easement would mean that the dominant tenements would cease to have access to the main road. Although no evidence was adduced as to whether the dominant tenements had other road access to the sub-divided lots, the respondent's case that the appellants failed to provide such road access to the dominant tenements meant that they did not have alternative access. Since the easement was still required by the current owners of the dominant tenement the argument of excessive use could not be maintained. In the circumstances it was concluded that the right of way was granted over the whole of Lot 27 and that it was granted for as long as the dominant tenements needed the right of way (see paras 39 & 46).

(3) Further the only right reserved by the grantor over Lot 27 was a right of way for himself and all other persons lawfully using the same from time to time. As such, the residual rights which the respondent had now inherited as a proprietor were nominal (see paras 42–44 & 46).

(4) The quality of the right of way as improved by the appellants benefitted all parties including the grantor and all other persons lawfully using the same. The respondent was not adversely affected by the improvements and had not suffered any loss or damage by the improvements (see paras 45–46).

[Bahasa Malaysia summary

Responden pada masa material adalah pemilik berdaftar bagi sebidang tanah, dinamakan sebagai Lot 27 di Daerah Tanah Bandar Kuching (Lot 27), yang diwarisinya daripada mendiang ayahnya. Pada pertengahan 1950 mendiang ayah responden (penjamin) telah membuat dua isemen ke atas Lot 27. Isemen pada asalnya diberikan hak laluan atas Lot 27 (tenemen bawahan) kepada pemilik empat bidang tanah (tenemen utama) 'their tenants, agents, servants, workmen, licensees and invitees'. Walau bagaimanapun, dalam perjalanan waktu empat bidang tanah tersebut telah dibahagikan dan hak laluan telah meningkat dan mengakibatkan hak persendirian kepada laluan menjadi hak awam. Peningkatan ini telah diperakui oleh Majlis Perbandaran (perayu ketiga), dengan tindakannya menurap jalan dengan tar menutup hak laluan dan mendirikan lampu-lampu jalan dan longkang-longkang di sepanjang jalan. Responden mengemukakan bantahan kepada penggunaan semasa Lot 27 sebagai hak laluan awam. Responden kemudiannya memfailkan tindakan terhadap perayu-perayu, antara lain, deklarasi bahawa isemen telah dimungkiri dan telah ditentukan atau diluputkan oleh keluputan masa. Adalah kes responden bahawa penggunaan melampau ke atas hak laluan yang diberikan telah menyebabkannya ketakadilan serius dan bahawa perayu bertanggungan bersama atau berasingan untuk kerugian penggunaan dan kenikmatan Lot 27. Responden mengemukakan bahawa dengan sub-bahagian ke atas tenemen utama, isemen telah dibuat untuk faedah tenemen asal telah diluputkan. Responden selanjutnya mengemukakan bahawa ia adalah tanggungjawab perayu untuk menyediakan laluan jalan sebelum meluluskan sub-bahagian tenemen dominan dan bahawa kegagalan atau kecuaian mereka untuk berbuat demikian menyebabkan responden kehilangan kegunaan tanah. Perayu mendakwa bahawa terma-terma instrumen mewujudkan isemen (surat ikatan) adalah jelas dan tidak samar telah dibuat dengan tujuan sebagai hak laluan awam atau isemen. Responden berhujah bahawa isemen yang diwujudkan adalah hak laluan persendirian. Hakim bicara mendapati bahawa perubahan dalam ciri-ciri penggunaan hak kepada laluan dari hak persendirian ke hak laluan awam telah menyebabkan isemen perlu ditentukan. Dalam hal kes ini ia telah diputuskan bahawa adalah wajar untuk mengisytiharkan bahawa isemen telah luput dan adalah ke atas perayu untuk mendapatkan daripada responden tanah yang mana isemen telah diberikan dan membayar pampasan kepada responden mengikut proviso Kanun Tanah Sarawak. Ini adalah rayuan daripada perayu terhadap keputusan atas alasan bahawa hakim bicara telah tersalah tafsir terma-terma instrumen isemen dan lain-lain fakta berkaitan.

Diputuskan, membenarkan rayuan dengan kos ditetapkan sebanyak RM20,000:

(1) Surat cara dalam kes ini menunjukkan bahawa pemberi telah memberi hak laluan melalui isemen kepada penerima dan pengganti dalam surat cara. Cara yang betul untuk memahami perkataan-perkataan di dalam

surat cara memerlukan bukan sahaja pemeriksaan perkataan-perkataan itu tetapi haruslah diingat bahawa undang-undang isemen adalah tentang hak yang telah diberikan oleh pemilik tenemen bawahan kepada pemilik tenemen dominan. Pemeriksaan ke atas surat cara dalam kes ini menunjukkan tiada proviso yang mengehadkan hak laluan ke atas apa-apa bahagian Lot 27 atau apa-apa jangka masa. Oleh itu, isemen telah diberikan ke atas seluruh Lot 27 tanpa had masa (lihat perenggan 32–35, 42 & 46).

(2) Penamatan isemen bermakna tenemen dominan akan terhenti memiliki akses atas jalan utama. Walaupun tiada bukti yang dikemukakan berkenaan sama ada tenemen dominan mempunyai akses jalan ke lot-lot yang dibahagikan, adalah kes responden bahawa perayu gagal untuk menyediakan akses jalan ke tenemen dominan bermaksud mereka tidak mempunyai akses alternatif. Memandangkan isemen masih lagi diperlukan oleh pemilik semasa tenemen dominan hujahan penggunaan melampau tidak dapat dikekalkan. Dalam hal ini ia telah disimpulkan bahawa hak laluan telah diberikan ke atas seluruh Lot 27 dan bahawa ia diberikan selama mana tenemen dominan memerlukan hak laluan (lihat perenggan 39 & 46).

(3) Selanjutnya satu-satu nya hak yang dirizab oleh pemberi ke atas Lot 27 adalah hak laluan untuk dirinya dan semua orang yang secara sah menggunakannya dari masa ke semasa. Oleh itu, hak residual yang diwarisi oleh responden sebagai pemilik adalah nominal (lihat perenggan 42–44 & 46).

(4) Kualiti hak laluan sebagaimana ditambah baik oleh perayu menguntungkan semua pihak termasuk pemberi dan semua orang lain yang menggunakannya secara sah. Responden tidak terjejas teruk oleh peningkatan dan tidak mengalami apa-apa kerugian atau kerosakan disebabkan oleh peningkatan itu (lihat perenggan 45–46).]

Notes

For cases on extinguishment of, see 8(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3276–3278.

Cases referred to

Chee Keng Industries Sdn Bhd v Masalam Sdn Bhd & Ors [2000] MLJU 529; [2000] 1 LNS 179, HC (refd)

Chin & Sons (1955) Sdn Bhd & Ors v William Crocket & Ors [1997] 4 CLJ Supp 111, HC (refd)

Chin & Sons Sdn Bhd & Ors v William Crocket & Ors [2000] 5 MLJ 497, HC (refd)

Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697, SC (refd)

Ellenborough Park, Re [1956] Ch 131, CA (refd)
Lee Tat Development Pte Ltd v Management Corporation of Orange Heights Strata Title No 301 [1992] 2 SLR 865, HC (refd)

Legislation referred to
Rules of the High Court 1980 O 15 r 16
Sarawak Land Code (Cap 81) ss 141, 183

Appeal from: Originating Summons No KCH-24–5 of 2001 (High Court, Kuching)

JC Fong (Saferi bin Ali with him) (State Legal Counsel, State Attorney General's Chambers) for the appellant.
Christina Eng (CJ Eng Advocate) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

THE ORDERS APPEALED AGAINST

[1] On 24 August 2011, the High Court in Kuching granted the following orders in favour of the plaintiff Teo Soo Chuan ('the respondent'):

(a) a declaration that the easements created under Instrument No L 1457/1956 and No L12[5]52/1957 have determined and have been overtaken by events;

(b) that the first defendant through the fourth defendants (the first to fourth appellants herein) do acquire the plaintiff's land described as Lot 27 Section 58 Kuching Town Land District over which the easements had been granted and to pay compensation to the plaintiff in accordance with the provisions of the Sarawak Land Code; and

(c) that the defendants do pay agreed costs of RM8,000 to the plaintiff.

[2] The appellants gave notice of appeal on 22 September 2011 against the whole of the decision.

THE GROUNDS OF OBJECTION

[3] By their memorandum of appeal dated 10 October 2011, the appellants set out in extensor their grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly

decided, which we summarise to be against:

(a) the failure to properly construe the terms of the easement instruments and other relevant facts;

(b) the declaration that the 'easements created under Instruments No L 1457/1956 and L 1552/1957' have been determined and have been overtaken by events;

(c) the order to the appellants to acquire the land the subject of the easement and to pay compensation therefor; and

(d) the failure to consider the issue there was an undue delay by the respondent in seeking the declaratory order and that the application of the respondent is statute barred.

BRIEF BACKGROUND

[4] The respondent's application was commenced under an originating summons, and it arose out of an easement granted under the aforesaid instruments executed by deeds in 1956 and 1957 under the Land Ordinance then in force before the coming into force of the Land Code. The deeds were registered in the Kuching Land Registry Office as Instruments Nos L1457/1956 and L1552/1957. The easement granted covered the whole of Lot 27 Section 58 Kuching Town Land District ('Lot 27') as shown in the map attached to the deeds, and is T-shaped linking the main road ('Central Road') to the dominant tenements at the top of the T 'and on both sides thereof'.

[5] The deeds are not limited by any provision as to any time period.

[6] Over time the right of way was improved and tar-sealed as a road providing access.

THE SUBMISSIONS OF THE APPELLANT

[7] It was submitted for the appellants before us that:

> 2.8 From the terms of the Deeds it is evident that ALL that parcel of land is to be used as a 'Right of Way' from a PUBLIC ROAD to the dominant tenements, and that right of way may be used by the owners of the dominant tenements, their successors in title, invitees, tenants, and 'ALL OTHER PERSONS' lawfully using the same, including the Grantor. Having regard to the clear and unambiguous terms of the Deeds, what was intended to be created is a public right of way or easement. By the use of the words 'TRANSFER AND GRANT' in the Deeds, the Grantor

must have intended that those rights which he had a registered proprietor of the said land, would have passed onto the Grantees, otherwise there is no need for him to use the word 'TRANSFER'.

2.9 According to the respondent's letter dated 1 November 1997, the said land 'was converted to a public road' and that it was 'resurfaced with the Bitumen and has been maintained by the Kuching City South Council ever since 20 years ago'. However, the learned Judge found as a fact that the road was first tar-sealed in the 1960s. In other words, since the 1960s, the right of way created by the Deeds, had been used as a public road to the knowledge of the respondent and his late father (Grantor). This action was commenced only in 2011 and in any event, on the evidence, the respondent only first complained about the said land being used as a public road in November, 1997.

…

2.12 The Grantees of the right of way or their successors in title have not been made parties to the proceedings in the Court below and in this Appeal

THE CASE FOR THE RESPONDENT

[8] In his claim, the respondent as plaintiff sought orders as follows:

(a) a declaration that the terms of the easements created under Instrument No L1457/1956 and L1552/1957 had been breached and the said easements have expired, and/or been determined and/or have been extinguished;

(b) further or alternatively, a declaration that the easements created have been extinguished by the effluxion of tim;

(c) a declaration that at all material times the first, second, third and fourth appellants are liable to provide road access for the occupants of all the residents in the vicinity of Lot 27;

(d) further or alternatively, a declaration that the second and/or fourth appellants were negligent in failing to acquire the necessary land for road reserve for purpose of road access when they approved the subdivision for Lots 62, 63, 47 48 & 49, 33, 34, 35 and 36 all of Section 58;

(e) further or alternatively, a declaration that the failure and/or negligence of the second and/or fourth appellants to provide such requisite road access has led to the loss suffered by the respondent for many years;

(f) (Further or alternatively, in tar-sealing Lot 27, providing lighting and maintaining drainage, etc, without the consent or knowledge of the respondent, the third appellant had unilaterally acknowledged that the appellants herein jointly or severally are responsible for maintaining the right of way created under the said easements in breach of the terms thereof;

(g) an order that the appellants herein jointly or severally are liable to compensate the respondent for the loss of the use and enjoyment of Lot 27;

(h) further or alternatively, an order that the appellants herein jointly or severally ought to acquire the said property from the respondent;

(i) an order that an inquiry be conducted as to a fair value for the compensation of the said property; and

(j) any such order as the court deems just and costs.

[9] It was submitted before us for the respondent as follows:

(a) the respondent inherited from his father and is presently the registered proprietor of Lot 27. The two easements granted by his father in the mid 1950s were created under instruments No L 1457/1956 and L 1552/1957 in favour of Lots 33, 34, 35, 36, 62 and 63 (previously Lot 31), 47, 48, and 49 Section 58, ie altogether nine tenements only for the nine families;

(b) when the easements or right of way were created in the mid 1950s, it was little more than a footpath;

(c) the original tenements had since been sub-divided until the number of sub-lots is more than 80, and the number of passer-bys and users and traffic over the easement has increased 'exponentially and dramatically'. Further in the 1960s, the third appellant had tar-sealed the said Lot 27, without the respondent's consent or knowledge;

(d) again in or about October 1999 further tar-sealed Lot 27 thereby further expanding and extending the area utilised and the usage thereof from what was actually originally granted under the said easements. It was submitted that this was done 'illegally', and under the protests of the respondent;

(e) the first, second and fourth appellants had approved subdivision of the original dominant tenements all without the knowledge or consent of the plaintiff or his late father; and

(f) in approving the subdivision of the dominant tenements, the first, second and fourth appellants had failed and did not make any provision for a right of way or access and instead used Lot 27.

[10] It is also central to the submissions for the respondent that:

(a) the easement created was a private right of way for the proprietors of the nine tenements together with their tenants, agents, servants, workmen, licensees and invitees in common with the grantor;

(b) the present use of Lot 27 is not what the grantor intended as the hypothetical reasonable man;

(c) citing *Chee Keng Industries Sdn Bhd v Masalam Sdn Bhd & Ors* [2000] MLJU 529; [2000] 1 LNS 179. it was submitted that what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties in 1956 and 1957;

(d) the present use of Lot 27 as a public right of way is undeniably a case of grave injustice because although legally the plaintiff owns Lot 27 but this strip of land is now serving the public but at the plaintiffs sole expense and sacrifice and totally against his will and desires; and

(e) It is a case of excessive user of the right of way granted.

[11] On the issue of effluxion of time, it was submitted:

(a) citing *Chin & Sons Sdn Bhd & Ors v William Crocket & Ors* [2000] 5 MLJ 497 that even though the instrument creating the right of way was completely silent on duration of the right of way, it was inconceivable that it was meant for perpetuity. Therefore, this necessarily and logically means that it can expire from effluxion of time;

(b) since the original nine tenements no longer exist but replaced by sub-lots, it is only logical that the easement created thereunder have been extinguished by the effluxion of time; and

(c) s 141 of the Land Code contains a provision '… Provided that, unless the determination or extinguishment was by effluxion of time …'

[12] On the words 'transfer and grant', it was submitted:

(a) that it obviously only refers to the right of way over the land because it is not disputed that the respondent remains the registered proprietor of Lot 27; and

(b) that by cl 1, the right of way created was granted to the grantees and 'their successors in title, owners and occupiers of the dominant land' must be read subject to cl (3) that 'The several rights and obligations hereby created shall ensure to the benefit of and shall bind the parties hereto and their respective executors administrators and assigns'.

A JUDGMENT IN THE HIGH COURT

[13] The grounds of decision of the High Court set out the background and then proceeded:

B (a) to summarise and deal with the objections raised by the respondents as the defendants in the High Court:

(i) under s 141 of the Land Code, only the Registrar of the Lands and Surveys Department has the power to extinguish and remove the C easements;

(ii) the subdivision of the eight lots (the dominant tenement) does not extinguish the easements: *Lee Tat Development Pte Ltd v Management Corporation of Orange Heights Strata Title No 301* [1992] 2 SLR 865: D

(iii) the court does not have the power to declare the easements as being extinguished; and

(iv) the correct forum to hear this dispute, pursuant to cl (4) in the two E instruments creating the easements is an arbitrator.

[14] The High Court accepted the view in *Chin & Sons (1955) Sdn Bhd & Ors* [1997] 4 CLJ Supp 111 that s 141 read with s 183 of the Land Code and F O15 r 16 of the Rules of the High Court 1980, conferred on the court the jurisdiction to make an order of determination or extinguishment of an easement; and followed *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 (FC), that the court can still make binding declarations in the absence of the affected party. The High Court expressed the G view that when the statutory provisions are silent and the court's jurisdiction is not specifically ousted by any law, it has the jurisdiction to determine the dispute brought before it in order to make declaratory orders under O 15 r 16. This, in our view, is correct provided all necessary and interested parties are before the court. However, the discussion at some length in the judgment of the H decisions in *Chin & Sons (1955) Sdn Bhd & Ors v William Crocket & Ors* [1997] 4 CLJ Supp 111 and *Chin & Sons Sdn Bhd v William Crocker* [2000] 5 MLJ 497 in relation to s 141, and rejecting the latter is unnecessary for determination of the question whether the High Court had the requisite power. The latter case correctly interpreted that s 141 as authorising the I registrar to make an entry in the register when an easement has been determined or extinguished:

Section 141

Where an easement has been determined or extinguished, the Registrar shall, upon proof to his satisfaction of the determination or the extinguishment, make an appropriate entry upon the Register and upon any relevant instrument relating thereto:

Provided that, unless the determination or extinguishment was by effluxion of time or merger, the Registrar before making the entry in the Registrar shall give notice of his intention so to do to all persons appearing to him to be entitled to any interest under the easement or shall give at least one month's notice of his intention in the *Gazette*.

[15] The High Court then considered *Lee Tat Development Pte Ltd v Management Corporation of Orange Heights Strata Title No 301* on the question of excessive use before proceeding to consideration of the case before it.

[16] The entire consideration is as follows:

In the facts before me, it is clear that when the right of way was given it was for the use of four owners and of course other persons authorized as described in the instruments. It is also patently obvious that when the four pieces of land were sub-divided, the usage of that right of way has been increased beyond the comprehension of its grantee. That it was, to borrow the words of May LJ in *Graham*'s case, excessive in both quantity and quality. This increase is acknowledged by the Municipal Council by its act in tar-sealing the right of way and putting up street lightings and drains along the way. In other words, as Ms CJ Eng rightly submitted, what was essentially a private right of way, has become a public right of way. This change in the characteristic of the usage of the right of way in my view has caused the easements to be determined. It is highly repugnant to the concept of justice to expect the plaintiff to put up with this change of circumstance without any redress even though the instruments expressly provide that the right of way are for the benefit of the successors in title of the grantees. But these successors in title cannot be so liberally construed as to include those who hold subdivided titles in the numbers and the magnitude as seen in this case. The object and intent of the easements have clearly been overtaken by events and the passage of time has rendered it otiose.

Although in my judgment the plaintiff cannot be stopped from seeking redress from the court on the transgression of his right as owner of the land, but what is right must also be reasonable. I could not extinguish the easement and return the land over which the right of way was granted back to the plaintiff for that would greatly inconvenience the owners of the sub-divided lots who depended on it to access their homes. What I could, and I think it is the fairest as it preserves the right of both the plaintiff and the sub-lot owners whilst making the relevant authorities own up to their responsibility and duty to the plaintiff, is to declare that the easements have been extinguished and for the first defendant, through the fourth defendant, the Superintendent of Lands & Surveys to acquire from the plaintiff the land, over which the easement had been created (prayer (viii) of the Originating Summons).

A And, as it is his constitutional right, for the plaintiff to be paid compensation for the acquisition in accordance with the provisions of the Land Code.

Lastly, I would award the plaintiff, cost of RM8,000 as agreed by the parties.

B **[17]** The High Court appeared to be led to the above conclusions even though it had earlier correctly identified that 'the dispute here is not between the dominant tenement and the servient tenement but between the servient tenement and the relevant authorities for making the right of way a comfortable ride for the owners of the sub-divided lots'.

C

[18] We do not propose to debate the conclusions. We confine ourselves to addressing with objective detachment the cause of action relied upon, the facts, the evidence in respect of disputed facts and to measure the same on the yardstick of the law.

D

THE PROPER PARTIES BEFORE THE COURT

[19] The point was made by the appellants that the grantees of the right of way or their successors in title have not been made parties to the proceedings in E the court below and in this appeal.

[20] While it is true that the respondent as plaintiff could, and even perhaps should, have named the grantees or their successors in title, it is always a plaintiff's choice in the adversarial system as to the cause of action and the facts F in support thereof that he chooses to rely upon. And the plaintiff is entitled to a decision on the case he puts before the court, and not on what he could have put.

G **[21]** It is evident from the parties named as defendants that the respondent takes issue with the improvements and use by the appellants of Lot 27 over which a right of way had been granted to the dominant tenements.

[22] On the facts of the instant case and for the reasons stated above, we H dismiss the point that the proper parties have not been brought before the court.

[23] Given that a right of way had been granted by the grantor over Lot 27, the pertinent question is what is the residual interest of the grantor in the I servient tenement? To do so, the need arises to examine the easement granted.

EASEMENTS

[24] We find no difficulty with the meaning of 'easement' in the *Concise*

Oxford Dictionary as '(Law) right of way or similar right over another ground'. Nor do we have any difficulty with the definition of easement in *West's Encyclopaedia of American Law* (2nd Ed) that:

> A right of use over property of another. Traditionally the permitted kinds of uses were limited, the most important being 'rights of way' and rights concerning flowing waters. The easement was normally for the benefit of adjoining lands, no matter who the owner was (an easement appurtenant) rather than for the benefit of a specific individual (easement in gross).

[25] It means not all easements are the same. This underlines the need to examine the terms of the agreement between the grantor and the grantee that determines the precise nature and extent of the particular easement which, in this case, is the right of way that had been granted, and from that determine what is the residual interest of the proprietor of the servient tenement.

[26] We bear in mind the four essential characteristics of an easement set out by the learned authors of *Gale on Easements* (Published 1997) based on the decision in *Re Ellenborough Park* [1956] Ch 131:

(a) there must be a dominant and servient tenement;

(b) an easement must accommodate the dominant tenement;

(c) dominant and servient owners must be different persons; and

(d) a right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.

THE DOMINANT AND SERVIENT TENEMENTS

[27] We proceeded to examine the deeds under the four essential characteristics described in *Gale on Easements*. Of these, there is no dispute the owners of the dominant and the servient tenements were different persons, and the right granted over Lot 27 was capable of forming the subject matter of a grant as indeed the respective deeds were executed and registered as L 1457/1956 and L 1552/1957. The issues before us pertain primarily to the second characteristic, but to add to clarity, we address the first characteristic also.

[28] The servient tenement is the land owned by the grantor of the easement. It was set out in the first schedule to the deeds as:

> All that parcel of the land together with all the buildings and appurtenances thereon, containing an area of 0.63 acres, more or less, situate at Central Road, Kuching, Sarawak and described as Lot 27 Section 58, Kuching Town Land District.

[29] We noted from the certified document of title of the servient tenement that it is not in perpetuity, but for 845 years from 26 May 1937. In other words, it is a leasehold with an annual rent of RM4pa. More pertinently, it is endorsed as:

(a) subject to a right of way appurtenant to Lots 33, 34, 35, 36, 47, 48, 49, 62 & 63 Section 58 KTLD vide L 1457/56 of 16 January 1957; and

(b) subject to a right of way appurtenant to Lots 33, 34, 35 section 58 KTLD vide L1552/57 of 30 December 1957.

[30] The dominant tenements were set out in the second schedule of the deeds:

(a) deed L 1457/1956: Lot 31 (mutated into Lots 62 & 63), Lot 47, Lot 48 and Lot 49 of section 58; and

(b) deed L 1552/1957: Lot 33, Lot 34, Lot 35 and Lot 36 of section 58.

[31] We continue our examination of the terms of the deed.

THE EASEMENT GRANTED TO ACCOMMODATE THE DOMINANT TENEMENT

[32] The deeds signified that the respondent's father as grantor had agreed with the grantees to the grant of right of way in the nature of an easement:

> the Grantor Doth Hereby TRANSFER AND GRANT unto the Grantees and their successors in titles for the time being of the dominant tenement or any part thereof in the nature of an easement thereto the full and free right and liberty for them and their tenants and agents servants workmen licencees and invitees in common with the Grantor and all other persons lawfully using the same from time to time and at all times by day or night to pass and repass with or without horses or domestic animals of any kind and/or with or without carriages vehicles or implements of any kind over and along all that parcel of land coloured yellow in the plan and therein marked 'Right of Way' for the purpose of giving access to the dominant tenement from the public road …

[33] Thus, firstly, the grantor transferred and granted in the nature of an easement thereto the full and free right and liberty … lawfully using the same from time to time by day or by night to pass and repass … with or without carriages, vehicles or implements of any kind.

[34] Secondly, at all times it was only an easement transferred and granted over and along all that parcel of land coloured yellow in the plan, and therein

marked 'Right of Way' for the purpose of giving access to the dominant tenement from the public road …, and not title to the land itself.

[35] A proper appreciation of the words in the deeds requires not just an examination of the words used, but also to bear in mind at all times that the law of easements is about rights granted by the proprietor of a servient tenement to the proprietor of a dominant tenement. The proprietor of the servient tenement could grant to the grantees and their successors in title a use the right of way for themselves and their tenants and agents, servants, workmen, licencees and invitees. It is a law binding rights between tenements. There can be no easement granted by or to anyone unrelated to or with any tenement.

[36] That is not to say however that the proprietor of a servient tenement could not reserve for himself, and as the proprietor of the tenement to grant permission to the public a right of way.

[37] Therefore, the words 'and all other persons lawfully using the same from time to time …' can only be read as 'in common with the grantor and all other persons lawfully using the same from time to time …' and this case is evidently therefore, a case of the grantor reserving the right to also use the right of way for himself and all other persons lawfully using the same from time to time.

[38] Hence, thirdly, the easement was granted by the proprietor of the servient tenement to the dominant tenements or any part thereof, namely their proprietor and their tenants and agents, servants, workmen, licencees and invitees, and he reserved for himself and all other persons lawfully using the same from time to time the right to use the right of way. In other words, not only the grantees could not deny the public lawfully using the same, from using the right of way, but the grantor intended to allow the public also to use the right of way.

[39] Examination of the deeds show no provision limiting the right of way to any part of Lot 27. Or to any length of time. The shape of Lot 27, and its dimensions and location in relation to the dominant tenements show the entire Lot 27 provided access for the dominant tenements. Termination or cessation of the easement would mean that the dominant tenements would cease to have access to the main road. There is no evidence placed before the court that the dominant tenements have other access, and indeed the case for the respondent that the appellants failed to provide road access to the subdivided lots under the dominant tenements means it is the respondent's case that they do not have alternative access.

[40] There is a provision in the deeds that the costs of and incidental to the preparation, stamping and registration of the easement shall be borne by and

paid by the grantees and the grantor in equal shares. Not only does this add to the reason why the grantor reserved for himself and all other persons lawfully using the same from time to time the right to use the right of way, but it also indicates that there is something lost in the interstices of time about what must have been a mutual accommodation and benefit between the grantor and grantees.

[41] There is no evidence before the court as to why the grantor granted the right of way over Lot 27 and why Lot 27 is shaped as a 'T' in such narrow dimensions. It is tempting to conclude Lot 27 was so shaped and dimensioned to provide access for the dominant tenements, but that would be speculation.

[42] We conclude, therefore, that:

(a) the right of way was granted over the whole of Lot 27;

(b) it was granted for as long as the dominant tenements needs the right of way; and

(c) the grantor reserved for himself and all other persons lawfully using the same from time to time the right to use Lot 27 as a right of way.

CONCLUSIONS VIS-A-VIS THE APPELLANTS

[43] Since the only rights reserved by the grantor over Lot 27 was a right of way for himself and all other persons lawfully using the same from time to time, the residual rights the respondent has now inherited is nominal as a proprietor.

[44] The right of the public to use the right of way was specifically reserved by the grantor. As mentioned above, it prevents the grantees themselves from denying the public from the use of the right of way.

[45] The obligation to maintain and repair the right of way was on the grantees. The improvements on Lot 27 by the appellants do not adversely affect the respondent. Furthermore, the appellants' improvements to Lot 27 are consistent with the use of Lot 27 for the right of way as granted. That the improvements and repairs are paid for by the appellants rather than the proprietors of the dominant tenements or their successors in title is, in our view, mere grouchy hair-splitting incapable of attracting any legal significance.

[46] We concluded that the terms of the deed and the relevant facts had been

misconstrued. The nature and extent of the easement granting the right of way was such that since:

(a) the easement was granted without limitation of time, and was still required by the current owners of the dominant tenements, effluxion of time does not arise;

(b) the easement was granted over all of Lot 27 without limitation of time and all that was reserved was the right of way for the grantor and all other persons lawfully using the same, the argument of excessive use cannot be maintained;

(c) for the same reason as (b) above, the remaining residual interest is purely nominal as the registered owner with no value; and

(d) the quality of right of way as improved benefited all parties, including the grantor and all other persons lawfully using the same, the respondent suffered no loss or damage.

[47] We were concerned with the injustice of the respondent paying rates and assessments, and we had suggested these be verified and if there was any an amicable accommodation may be arrived so that the respondent is not out of pocket. There were letters written by the respondent claiming he paid rates of RM35,000 per year. In the appeal records, we find no evidence of any such payment. As it turned out, we were informed that no land rent or assessment rates had been paid to the authorities by the respondent since the respondent became the registered owner of the servient tenement (Lot 27).

[48] In the absence of such evidence or an amicable accommodation, we allow the appeal for the reasons above set forth, set aside the order of the High Court and fix costs in the sum of RM20,000 here and below.

Appeal allowed with costs fixed at RM20,000.

Reported by Kohila Nesan